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No. 08-441

IN THE

Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL GROUP, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents an underlying membership of over three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including in *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioner and respondent have filed letters with the Clerk's Office consenting to the filing of amicus briefs in support of either party.

53 (2006); and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

The Chamber's members have a substantial interest in the issues that this case presents regarding the burden of persuasion under the Age Discrimination in Employment Act. As explained below, this Court should take this opportunity to rectify the confusion in lower courts produced by the splintered opinions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Court should clarify that the various opinions in *Price Waterhouse* address the unusual issue of proving causation in fact where the challenged employment decision was made by a multi-member decisionmaking body in which some, but not all, members may have acted on discriminatory grounds. In that circumstance, consistent with the common law of torts, once a plaintiff proves that unlawful discriminatory animus actually caused the challenged action, *Price Waterhouse* affords a defendant an affirmative defense that requires the defendant to prove that it would have taken the same employment action even absent impermissible bias on the part of one or more of its agents. But *Price Waterhouse* has nothing to do with the vast majority of age-discrimination cases where a single plaintiff claims that a single decisionmaker took an unlawful action. And *Price* Waterhouse plainly does not apply where, as here, a plaintiff offers a prima facie case and attacks a single decisionmaker's non-discriminatory explanation for the challenged employment action as pretextual, providing no other evidence of discrimination. In such a quintessential *Burdine-McDonnell Douglas* case, the plaintiff retains, at all times, the burden of

proving that the defendant discriminated on the basis of age.

SUMMARY OF ARGUMENT

The question raised by this ADEA case is whether, and if so in what circumstances, a court may properly shift the burden of persuasion to the defendant-employer to show that unlawful age bias did not cause the employment action in issue. Petitioner complains that the court below erred in holding that the burden of persuasion on the issue of causation may shift only where a plaintiff is able to "present direct evidence of discrimination." But the court below rendered no such holding, and its conclusion that burden-shifting is not allowed in this case was entirely proper.

1. In accordance with the common law of torts and the conventional civil-litigation rule that plaintiffs must prove their cases, this Court has consistently required plaintiffs bringing suit under the ADEA to carry the burden of proving that the defendant discriminated on the basis of age. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

2. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), six Justices (albeit without producing a single majority opinion) recognized a narrow exception to this rule. *See id.* at 252-53 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 276-77 (opinion of O'Connor, J.). There, the challenged employment decision was made by a multi-member body (a partnership admissions committee), not by a single company supervisor or manager. *Id.* at 232-33

(opinion of Brennan, J.). Therefore, rather than presenting a binary question of intent, *Price Waterhouse* presented the fact-finder with a complex problem of multiple causation: which of the multiple grounds—both discriminatory and non-discriminatory—on which the individual members of the decisionmaking body acted was decisive in producing the challenged employment decision? In that limited circumstance, in accordance with common-law tort cases and other precedents allowing burden-shifting in multiple-causation contexts, the six Justices forming the majority in *Price Waterhouse* concluded that once a plaintiff proves that unlawful bias was a substantial factor in the challenged decision, the defendant is entitled to an affirmative defense against liability if it nonetheless proves that it would have taken the same employment action even absent discrimination.

3. This case falls squarely within the conventional rule requiring the plaintiff to carry the burden of proving that the defendant discriminated on the basis of age. This case does not involve multiple forces that allegedly caused the challenged employment action, thus raising the particular problems of proving causation with which *Price Waterhouse* was concerned. Rather, it was a quintessential single-decisionmaker pretext case in which the central issue was whether or not the non-discriminatory explanation for the challenged employment action offered by Petitioner's supervisor, and the supervisor's denials that bias played *any* role in the challenged decision, should be believed. Indeed, not only is the *Price-Waterhouse* framework inapposite in the context of this single-decisionmaker case, but it was clear error for the district court to

have inserted an affirmative defense into the case that the defendant had not raised, and to which the defendant had in fact objected. The Eighth Circuit correctly held that the district court erred by shifting the burden of persuasion to the defendant in such a case.

4. Any other construction of *Price Waterhouse* would shift the burden of persuasion to defendants in virtually every ADEA case, contrary to the statutory text and well-settled rules concerning the burden of proof in civil litigation. Accordingly, the Court should resolve any ambiguity in the meaning of the fractured *Price Waterhouse* opinions by holding that *Price Waterhouse* is limited to unique cases involving the unusual problem of multiple causation, such as the situation presented by *Price Waterhouse* itself. Alternatively, the Court should abandon *Price Waterhouse* altogether and hold that ADEA plaintiffs bear the burden of proof at all times.

ARGUMENT

I. AGE-DISCRIMINATION PLAINTIFFS BEAR THE BURDEN OF PERSUASION, EXCEPT IN THE UNUSUAL CIRCUMSTANCE WHERE MULTIPLE FORCES CAUSED THE CHALLENGED EMPLOYMENT ACTION

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). As this Court has made clear, when an employee alleges disparate treatment "because of" age in violation of this statute, "'liability depends on whether the

protected trait (under the ADEA, age) actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Hence, a plaintiff must prove that his age "'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Id.* (quoting *Hazen Paper*, 507 U.S. at 610) (alterations in original).

In assessing ADEA claims, both this Court and lower courts have consistently applied proof standards and procedures adopted in precedent cases interpreting identical language in other employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, which prohibits discrimination "because of [the employee's] race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1). *See Reeves*, 530 U.S. at 141-42; *Hazen Paper*, 507 U.S. at 612 (describing Title VII decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), as "creating proof framework applicable to ADEA"). This case law, and the common-law background from which it draws, makes plain that, outside of unusual circumstances addressed in *Price Waterhouse* and not applicable here, ADEA plaintiffs bear the burden of proving that age was both the but-for and proximate cause of the challenged employment decision. *See, e.g.*, *Reeves*, 530 U.S. at 141; *Hazen Paper*, 507 U.S. at 610.

A. This Court's Precedents, Consistent with the Common Law of Torts, Ordinarily Require Plaintiffs to Carry the Burden of Persuasion Under the ADEA

Under the common law of torts, the general rule is that "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff." RESTATEMENT (SECOND) OF TORTS § 433B(1) (1965); *see also, e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (1993) (describing the "conventional rule of civil litigation" that the plaintiff must "prove his case by a preponderance of the evidence" (internal quotation marks and alterations omitted)).

In accordance with the common law, this Court has established a familiar framework for evaluating evidence of discriminatory intent in the typical employment discrimination case, where a single decisionmaker was responsible for the challenged employment action and the factual dispute between the parties turns on whether that decisionmaker bore discriminatory animus toward the plaintiff and whether such bias played a determinative role in the decision. In such cases, the plaintiff bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. This burden requires the plaintiff to prove that he or she "applied for an available position for which [he or she] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Tx. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *see also, e.g.*, *McDonnell Douglas*, 411 U.S. at 802. Once the plaintiff establishes such a prima facie case, the

burden of production shifts to the employer to "rebut the presumption of discrimination [raised by the plaintiff's prima facie case] by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254.

The employer's burden, however, is one of production only, not persuasion; the employer need not even "persuade the court that it was actually motivated by the proffered reasons." *Id.*; *see also, e.g.*, *Reeves*, 530 U.S. at 142. Instead, so long as "the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff," the burden shifts back to the plaintiff to persuade the trier of fact that the defendant's asserted non-discriminatory reasons for the action are a pretext and thus that impermissible discrimination was the true reason for the employer's adverse treatment of the plaintiff. *Burdine*, 450 U.S. at 254-56. At this stage, the plaintiff's burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

Throughout this three-stage process, as this Court has repeatedly emphasized, "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253); *see*

also, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Thus, in *Aikens*, the Court held that whether or not a plaintiff established a prima facie case of discrimination is "no longer relevant" once both parties have presented their evidence. *Aikens*, 460 U.S. at 715. At that stage, the trier of fact must evaluate "directly" the question whether intentional discrimination occurred, "just as district courts decide disputed questions of fact in other civil litigation." *Id.* at 715-16. As the Court explained, while "the question facing triers of fact in discrimination cases is both sensitive and difficult," "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact" on which plaintiffs bear the burden of proof. *Id.* at 716; *see also St. Mary's Honor Ctr.*, 509 U.S. at 511.

B. This Court's Precedents and the Common Law Recognize a Limited Exception That Shifts the Burden of Persuasion to Defendants in Certain Cases of Multiple Causation

It is true that, in a line of cases culminating in *Price Waterhouse*, this Court has concluded that, in limited circumstances, a defendant may avoid liability only by proving that it would have taken the same employment action even absent discrimination. But, properly understood, both by reference to their common-law antecedents and on their own terms, *Price Waterhouse* and the cases leading up to it are entirely compatible with the Court's holding that, in single-plaintiff cases challenging a single actor's

decision, the burden of persuasion remains with the plaintiff at all times.

1. The common law of torts recognizes a limited exception shifting the burden of persuasion to a defendant in certain cases of multiple causation. As the Second Restatement of Torts explains, "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." RESTATEMENT (SECOND) OF TORTS § 433B(3); *see also* RESTATEMENT (THIRD) OF TORTS § 28 (Proposed Final Draft No. 1, 2005) (indicating that although the plaintiff normally has the burden of proving causation, "the burden of proof, including both production and persuasion, on factual causation is shifted to the defendants" when one or more tortfeasors caused the harm and "the plaintiff cannot reasonably be expected to prove which actor caused the harm"). The rationale for this exception "is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." RESTATEMENT (SECOND) OF TORTS § 433B cmt. f.

The famous case of *Summers v. Tice*, 199 P.2d 1, 1-2 (Cal. 1948), illustrates these principles. There, two hunters fired their guns simultaneously and one of them struck the plaintiff, but the plaintiff could not prove which one it was. *Id.* at 1-2. Noting that "[t]o hold otherwise would be to exonerate both [hunters]

from liability, although each was negligent, and the injury resulted from such negligence," the court in *Summers* required that, in the unusual circumstances of that case, "the burden of proof . . . be shifted" to each defendant to show that his own individual negligence did not cause the plaintiff's injury. *Id.* at 3-4 (emphasis and internal quotation marks omitted). *See also, e.g.*, *Richman v. Sheahan*, 512 F.3d 876, 884-85 (7th Cir. 2008) (indicating that defendants are jointly and severally liable where "it is unclear which defendant's act was the one that inflicted the injury"); *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 218 (6th Cir. 1974) (holding in nuisance suit based on pollution from multiple plants that the burden of proof may shift to the defendants to show "which one was responsible and to what degree").

These principles also may apply when a tortfeasor's action merges with another, independent cause of the plaintiff's injury, thus making it difficult for the plaintiff to prove that the defendant's action was a necessary cause of the plaintiff's injury. In *Kingston v. Chicago & Northwestern Railway Co.*, 211 N.W. 913, 915 (Wis. 1927), for example, where a fire negligently set by the defendant merged with another fire of unknown origin before the combined fire destroyed the plaintiff's home, the court placed the burden on the defendant to show that its fire was not the cause of the plaintiff's injury. *Id. See also, e.g.*, *Richman*, 512 F.3d at 884 (indicating that tort defendants are jointly and severally liable where each defendant "might by his own act have inflicted the entire injury"); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 112 (D.D.C. 2006) (holding that "factual causation will not be defeated" where a

defendant's conduct more likely than not "would have led" to the plaintiff's injury, even if an "intervening event" also "would itself have been sufficient to produce the harm"), *aff'd*, 531 F.3d 884 (D.C. Cir. 2008).

Thus, although tort plaintiffs ordinarily must prove all elements of their claims, including any required elements of intent and causation, the common law has recognized a narrow exception to this rule in circumstances where multiple causation makes it unusually difficult for the plaintiff to prove that a defendant's misconduct caused the plaintiff's injury.

2. In the line of cases culminating in *Price Waterhouse*, this Court applied a similar burden-shifting framework to situations in which multi-member bodies make decisions that are challenged as discriminatory. Such cases present problems analogous to those in tort law concerning causation where multiple forces are at play.

For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court held that the burden of persuasion could be shifted to the defendant if the plaintiff established that a multi-member municipal board's zoning decision was "motivated in part by a racially discriminatory purpose." *Id.* at 271 n.21. Although the Court there concluded that the plaintiff had failed to carry this initial burden, it observed that, if the plaintiff's showing had been adequate, the burden would have shifted to the town to "establish[] that the same decision would have resulted even had the impermissible purpose not been considered." *Id.*

Similarly, in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court held that, once a teacher showed that First Amendment activity was a "substantial" or "motivating" factor in a multi-member school board's decision not to rehire him, the burden shifted to the board to establish that "it would have reached the same decision as to [the teacher's] reemployment even in the absence of the protected conduct." *Id.* at 287.

Further, in *Hunter v. Underwood*, 471 U.S. 222 (1985), in which plaintiffs challenged a felon-disenfranchisement provision of a state constitution as racially discriminatory, the Court held that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* at 228; *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (applying *Mt. Healthy* burden-shifting framework to termination of contractor by multi-member county board). As the Court observed in *Hunter*, "[p]roving the motivation" behind the action of a multi-member official body "is often a problematic undertaking," in part because "'[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.'" 471 U.S. at 228 (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

Although the Court produced no unified majority opinion in *Price Waterhouse*, the opinions embraced by six Justices in that case fall squarely within this line of precedent. There, as noted, two multi-member

bodies—the partnership's Admissions Committee and Policy Board—bore responsibility for the challenged promotion decision. 490 U.S. at 232-33 (opinion of Brennan, J.). And while there was evidence that "some of the partners reacted negatively to [the plaintiff's] personality because she was a woman," and opposed plaintiffs' promotion on that ground, there was also evidence that other partners may have opposed the plaintiff's promotion for non-discriminatory reasons (*i.e.*, because she had interpersonal difficulties with staff members). *Id.* at 234-35. The Court in *Price Waterhouse* thus confronted a classic problem of multiple causation: multiple forces, some lawful and some not, may have caused the challenged employment action, making it unusually difficult for the plaintiff to prove which force was decisive. In that limited circumstance involving multiple forces, once the plaintiff proved that gender actually caused the action of one or more members of the multi-member decisionmaking body, six Justices concluded that the defendant could avoid liability only by proving that it would have taken the same employment action even absent discrimination. *See id.* at 252-53 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 276-77 (opinion of O'Connor, J.).

Indeed, Justice Brennan, writing for a plurality of the Court, spoke expressly in terms of multiple causation. Analogizing the facts of *Price Waterhouse*, where multiple forces allegedly influenced the employer's action, to a situation where "two physical forces act upon and move an object" and "either force acting alone would have moved the object," Justice Brennan observed that gender discrimination may have been a cause of the employer's action in *Price*

Waterhouse even if there were other causes as well. *Id.* at 241 (opinion of Brennan, J.). He thus concluded that, once the plaintiff proved that gender was an actual, causative force in the employment action, the employer could prevail only by proving that it would have reached the same decision absent discrimination. *Id.* at 252.

Justice White likewise explained the Court's result by invoking the Court's prior cases addressing decisions of multi-member bodies. In his view, *Mt. Healthy* dictated the result in *Price Waterhouse*, since in *Mt. Healthy*—another case involving multiple decisionmakers—"the District Court found that the employer was motivated by both legitimate and illegitimate factors." *Id.* at 259 (opinion of White, J.). Because the plaintiff in *Price Waterhouse* had made a comparable showing, the employer could defeat liability only by "prov[ing] 'by a preponderance of the evidence that it would have reached the same decision . . . in the absence of' the unlawful motive." *Id.* (quoting *Mt. Healthy*, 429 U.S. at 287) (ellipsis in original).

In her separate opinion—viewed by the Eighth Circuit here as controlling, Pet. App. 5a—Justice O'Connor also expressly identified the multiple-causation underpinnings of the Court's holding. Citing both *Summers* and *Kingston*, Justice O'Connor observed that "the law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care." *Id.* at 263 (opinion of O'Connor, J.) (internal quotation marks omitted). Further, Justice O'Connor invoked

Arlington Heights, describing it as "a case which, like this one, presented problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions." *Id.* at 268. Based on these analogies, and because the plaintiff showed "by direct evidence that an illegitimate criterion was a substantial factor in the decision," Justice O'Connor concluded that the employer could prevail only by carrying its burden of establishing the affirmative defense that it would have taken the same employment action even absent impermissible forces. *Id.* at 276.

3. In short, all three of the opinions in *Price Waterhouse* draw on common-law principles concerning multiple causation in concluding that, in a limited class of cases, the defendant may avoid liability only by showing that it would have taken the same employment action even absent discrimination. Those common-law principles allow such a burden-shift, however, only where the plaintiff shows that multiple independent forces may have caused the injury, such as where a multi-member decisionmaking body is involved, and the plaintiff first proves that a prohibited criterion actually caused the action of one or more members of that body.

As described above, all three opinions spoke in terms of multiple causation. *See id.* at 252 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 263, 276 (opinion of O'Connor, J.). And all three permitted burden-shifting only after the plaintiff persuades the trier of fact that a prohibited criterion was one of the actual causes of the challenged

decision. *See id.* at 246-48 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.). In this context, where multiple causative forces are at work in an employment decision by a multi-member body, Justice O'Connor's frequently misunderstood statement that a plaintiff must prove by "direct evidence that an illegitimate criterion was a substantial factor in the decision" is obviously not a reference to a need for non-circumstantial evidence, but rather to a need for substantial proof—"strong[er]" than mere "stray remarks" or "statements . . . unrelated to the decisional process itself"—that unlawful bias was at least one of the multiple independent forces responsible for the adverse action at issue. *Id.* at 276-77 (opinion of O'Connor, J.).

This understanding of *Price Waterhouse* and its antecedents is further informed by the insistence of all six Justices in the *Price Waterhouse* majority that *Price Waterhouse* does not supplant the *Burdine-McDonnell Douglas* framework, and that *Price Waterhouse* applies only to a narrow group of employment discrimination cases. *See Price Waterhouse*, 490 U.S. at 247 (opinion of Brennan, J.); *id.* at 260 (opinion of White, J.); *id.* at 261 (opinion of O'Connor, J.). In both *Price Waterhouse* and other opinions, the Court has distinguished between, on the one hand, pretext cases that turn on whether the defendant is to be believed concerning "the 'true' motives behind the [challenged] decision," and on the other hand, those relatively rare cases in which the central issue is which of several independent forces caused the employment action at issue. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 & n.5 (1983) (distinguishing burden-shifting in multiple-force

cases from "pretext case[s]" controlled by the *Burdine-McDonnell Douglas* framework), *abrogated on other grounds by Director v. Greenwich Colleries*, 512 U.S. 267 (1994); *see also Price Waterhouse*, 490 U.S. at 247 (opinion of Brennan, J.); *id.* at 260 (opinion of White, J.); *id.* at 261 (opinion of O'Connor, J.).

Moreover, the burden of persuasion does not shift to the defendant in a pretext case merely because a single decisionmaker may have considered multiple factors—even unlawful factors—in reaching the challenged employment decision. Indeed, in requiring a plaintiff to prove that age "actually played a role in [the decisionmaking] process and had a determinative influence on the outcome," the Court in *Hazen Paper* (which was decided after *Price Waterhouse*) contemplated that age may not be the *sole* factor at play in a case subject to the *Burdine-McDonnell Douglas* framework. *Hazen Paper*, 507 U.S. at 610; *see also Reeves*, 530 U.S. at 141. Thus, *Price Waterhouse* applies only to the unusual case presenting the need to sort out the effects of multiple causes of an employment decision, such as cases involving multi-member decisionmaking bodies. It does not change the burden of persuasion in pretext cases, including those in which a single decisionmaker may consider multiple factors.

C. The Eighth Circuit Correctly Held That the District Court's Jury Instructions Improperly Placed the Burden of Persuasion Concerning Causation on Respondent

This case falls squarely within the *Burdine* line of cases, which required Petitioner to bear the burden of proof at all times. It does not present the unusual

circumstances in which *Price Waterhouse* contemplated that a defendant is entitled to an affirmative defense against liability if it proves that it would have taken the same employment action even absent discrimination. Indeed, Petitioner never produced evidence of discrimination beyond his prima facie case and his attacks on Respondent's non-discriminatory explanation for his reassignment, and Respondent never even sought to assert the *Price Waterhouse* affirmative defense.

This matter was a quintessential pretext case. Petitioner argued that his supervisor, Andy Lifland, demoted him because of his age, as purportedly evidenced by the alleged lack of any other reason for his demotion and by the fact that other employees in Petitioner's department over the age of 50 were also demoted at the same time. Compl. ¶¶ 13, 15-16; J.A. 6; Tr. 694, 701, 740-41, 746. Respondent argued that Lifland reassigned Petitioner to a position that better fit his skills and abilities, and that age had nothing to do with the reassignment.[2] Tr. 123-24, 126, 432, 437-38, 507, 532-33. The case thus turned on whether Respondent's explanation for Petitioner's reassignment was pretextual—that is, on whether or not Lifland should be believed about his "'true' motives behind the [challenged] decision."[3] *Transp.*

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[2] While Lifland was supported by Steve Wittmuss, his "second in command," Tr. 444, Lifland made the ultimate decision to reassign Petitioner.

[3] A plaintiff alleging age discrimination must establish both that unlawful motivation caused an adverse employment action (*i.e.,* but-for causation) and that the defendant-employer is legally responsible for that discriminatory motivation (*i.e.,* proximate causation). *See, e.g.*, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544-45 (1999); *Faragher v. City of Boca Raton*, 524

Mgmt., 462 U.S. at 400 n.5. The case raised none of the issues concerning multiple causation with which *Price Waterhouse* was concerned.

Indeed, as Justice Brennan recognized in *Price Waterhouse*, the showing that an employer would have taken the same employment action even absent discrimination "is most appropriately deemed an affirmative defense" to be invoked by the employer. *Price Waterhouse*, 490 U.S. at 246 (opinion of Brennan, J.); *see also Transp. Mgmt.*, 462 U.S. at 400. But Respondent never invoked that affirmative defense in this case. Petitioner simply made a prima facie case and attacked Respondent's explanation for the reassignment as pretextual; he never presented evidence that would have prompted Respondent to invoke its affirmative defense under *Price Waterhouse*. Respondent, in turn, argued only that age played no role in the decision to reassign Petitioner; it never argued in the alternative that, even if bias played a role in Lifland's decision, Lifland would have made the same decision even absent discrimination. *See* J.A. 6; Tr. 711-36.

The *Burdine* framework, in which the plaintiff bears the burden of persuasion at all times, not the *Price Waterhouse* framework, therefore applied to this case. *See Price Waterhouse*, 490 U.S. at 247 (opinion of Brennan, J.); *id.* at 260 (opinion of White, J.); *id.* at 261 (opinion of O'Connor, J.); *see also*

(continued…)

U.S. 775, 805-06 (1998); *see also, e.g.*, *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998). Only the former is at issue here.

Transp. Mgmt., 462 U.S. at 400 n.5. But, by instructing the jury that petitioner needed only to show that age was a "motivating factor" in the employer's decision to demote him, at which point the employer could prevail only by "prov[ing] by a preponderance of the evidence that [it] would have demoted plaintiff regardless of his age," Pet. App. 6a (internal quotation marks omitted), the district court improperly shifted the burden of persuasion to the defendant on the ultimate question of whether the employer, acting through Petitioner's supervisor, discriminated on the basis of age. As the Eighth Circuit correctly recognized, "[t]he burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in [the employer's] employment action." Pet. App. 7a.

Indeed, not only is the *Price-Waterhouse* framework inapposite in the context of this single-decisionmaker case, but it was clear error for the district court to have inserted an affirmative defense into the case that the defendant had not raised, and to which the defendant in fact objected because the plaintiff failed to present any evidence that would have justified moving outside the *Burdine-McDonnell Douglas* framework.

Petitioner's argument that the Eighth Circuit erred in requiring him to prove his case through "direct" rather than "circumstantial" evidence of discrimination attacks a straw man. Br. for Petr. at 16-25. The Eighth Circuit did not distinguish direct from circumstantial evidence, but rather required, as a prerequisite to the application of the *Price*

Waterhouse framework, "evidence showing a specific link between the alleged discriminatory animus and the challenged decision . . . ." Pet. App. 5a (internal citations omitted). Moreover, while the Eighth Circuit's decision below may reflect some of the widespread confusion among the courts of appeals about the precise meaning of the splintered opinions in *Price Waterhouse*, its judgment is plainly correct. The district court erred in shifting the burden of persuasion on the causation issue to the defendant in this quintessential single-actor pretext case, which did not involve alleged multiple independent causative forces and in which Respondent did not invoke the affirmative defense afforded in limited circumstances by *Price Waterhouse*.

II. TO THE EXTENT THAT THE MEANING OF THE *PRICE WATERHOUSE* OPINIONS IS AMBIGUOUS, THE COURT SHOULD NOT CONSTRUE *PRICE WATERHOUSE* TO PERMIT SHIFTING THE BURDEN OF PERSUASION TO DEFENDANTS IN SINGLE-DECISIONMAKER CASES

To the extent that the meaning of the splintered opinions in *Price Waterhouse* is ambiguous, the Court should resolve the ambiguity by holding that *Price Waterhouse* is limited to unique cases involving the unusual problem of multiple causation presented by *Price Waterhouse* itself. A broad reading of *Price Waterhouse* that allows district courts to shift the burden of persuasion to defendants in cases involving single decisionmakers taking single employment actions would be unworkable and would contravene the statutory text and this Court's precedents.

As Justice Kennedy predicted in his *Price Waterhouse* dissent, "[c]onfusion in the application of dual burden-shifting mechanisms"—*Burdine-McDonnell Douglas* and *Price Waterhouse*—has been "acute." 490 U.S. at 292 (Kennedy, J., dissenting). The jury instructions here are a case in point. Even though there was no evidence of a multi-member decisionmaking body or other unusual circumstance creating special problems of proof due to multiple causation, the district court placed the burden of persuasion on the defendant to prove that it would have demoted petitioner "regardless of his age," so long as petitioner showed that age was a "motivating factor" in the demotion. Pet. App. 6a.

This approach would support shifting the burden of persuasion in circumstances far afield from the facts of *Price Waterhouse*. In some sense, nearly every contested ADEA case involves evidence of multiple "motivating factors," *i.e.*, "mixed motives"—on the one hand, there is evidence (such as the plaintiff's prima facie case) suggesting a discriminatory intention, while on the other hand the employer asserts that non-discriminatory factors (which the plaintiff alleges were pretextual) support its decision. Thus, if such a showing sufficed to shift the burden of persuasion to the defendant, then this Court's repeated admonition in applying the *Burdine-McDonnell Douglass* framework that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Burdine*, 450 U.S. at 253, would be a dead letter, for in practice the plaintiff would almost never bear the burden of persuasion on the central issue of discrimination. Indeed, the entire *Burdine-*

McDonnell Douglass framework itself would rarely be applicable, as almost all contested cases would instead be governed by the *Price Waterhouse* framework. While statutes and administrative agencies sometimes depart from the common law presumptions about causation, *see, e.g.*, 42 U.S.C. § 2000e-2(m); *Transp. Mgmt.*, 462 U.S. at 400, this Court has indicated that, absent such express direction from Congress or a responsible administrative agency to which deference is due, it will construe statutes consistent with common-law causation principles. *See supra* at 5-18. As Respondent argues at length, the construction of *Price Waterhouse* urged by Petitioner is inconsistent with the text and purpose of the ADEA and with conventional rules of civil litigation. *See* Br. for Resp. at 18-40.

Thus, *Price Waterhouse* should be construed to apply only where special circumstances such as a multi-member decisionmaking body create a problem of multiple causation. In the alternative, if the Court interprets *Price Waterhouse* to apply beyond its unique facts, the framework prescribed by the splintered opinions in that case should be abandoned altogether, as it contravenes the statutory text and this Court's other precedents, and has only yielded confusion and unpredictability in lower courts.

CONCLUSION

The Court should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

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